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No. 96-643

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE STEEL COMPANY, a/k/a CHICAGO STEEL AND PICKLING COMPANY,
Petitioner,

vs.

CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a company that has violated the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA") for eight years may avoid a citizen suit for penalties by filing late reports, after receiving formal notice that a citizen intends to file suit, but before a complaint is filed.

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BRIEF IN OPPOSITION

Respondent Citizens for a Better Environment ("CBE") respectfully requests the Court to deny the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

REASONS FOR DENYING THE PETITION

This case concerns the interpretation of a section of a statute. The Seventh Circuit used this Court's methodology for interpreting statutes and relied on the clear language of EPCRA to arrive at its decision. There is no conflict with any decision of this Court. To date, only two circuits, the Sixth and the Seventh, have ruled on the question presented. All eight district courts that have addressed the issue, including two courts which have issued decisions after the Seventh Circuit ruled, unanimously agree with the Seventh Circuit's opinion. The Sixth Circuit, the sole court disagreeing with the Seventh Circuit, stands alone, and may revisit its ruling in the future. The Court should allow the issue to percolate further among the circuits to determine if a broad and enduring circuit court split emerges.

STATEMENT OF THE CASE

A. The Emergency Planning and Community Right-to-Know Act of 1986

The Bhopal tragedy, in which more than 200,000 people were killed or injured from the unexpected release of toxic gas, and a series of smaller incidents closer to home prompted Congress to enact the Emergency Planning and Community Right-to-Know Act of 1986, 42

U.S.C. §§ 11001 *et seq*. EPCRA focuses on citizens. Its purpose is to "provide *the public* with important information on the hazardous chemicals in their communities, and to establish emergency planning and notification requirements which would protect the public in the event of a release of hazardous chemicals." H.Rep. No. 962, 99th Cong., 2d Sess. (1986). (emphasis added).

Each year, EPCRA requires industrial facilities using or storing threshold levels of specified hazardous chemicals, on dates certain, to file comprehensive reports with local, state and federal authorities reflecting the use and release into the environment of these chemicals. Timely EPCRA reporting is of the essence. *See* EPCRA § 312(a)(2), 42 U.S.C. § 11022(a)(2) (March 1 annual deadline for inventory reports); § 313(a), 42 U.S.C. § 11023(a). (July 31 annual deadline for release reports); *Citizens for a Better Environment v. The Steel Co.*, 90 F.3d 1237, 1243, n. 2 (7th Cir. 1996) (A12, n. 2) (citing Senate and House reports and statement of Rep. Sikorski).[1]

EPCRA requires government authorities to make information required by EPCRA available to the public in a comprehensible form. Each day in which a company fails to report its toxic chemical use deprives citizens of their statutory right to know about the toxic chemicals to which they are, or may be, exposed. When companies fail to file reports by the statutory deadline, citizens are

[1] The Seventh Circuit's slip opinion in *Citizens for a Better Environment v. The Steel Co.* is attached to the Petition as Appendix A. Citations herein to the Seventh Circuit's decision will refer to the relevant page of the Appendix (referred to hereafter as "A").

deprived of the information that they gather under EPCRA to identify and respond to environmental concerns and to encourage industry to reduce the use of hazardous chemicals. Local authorities use information required by EPCRA to work with citizens to formulate response plans intended to limit damage resulting from the accidental release of toxic chemicals. When a report is not filed on time, the local response plans are skewed and inaccurate. Government bodies also rely on timely information submitted under EPCRA to set regulatory priorities. Industry uses the data to identify opportunities for savings by reducing the use of toxic chemicals. In fact, since 1988, releases of toxic chemicals among those companies reporting under EPCRA have decreased nearly 43 percent. A2.

Recognizing that a major purpose of EPCRA is to inform citizens in a timely manner of industrial use of toxic chemicals, and penalize those who fail to comply, Congress drafted a unique citizen suit provision in EPCRA. With one exception,[2] all other environmental laws, including CERCLA's citizen suit provision[3] which Congress enacted as part of the same legislation as EPCRA, imply that the citizen must allege an ongoing violation by authorizing citizen suits only against persons "alleged to be in violation" of these laws. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation,*

[2] The exception is the Clean Air Act Amendments of 1990 discussed below.

[3] Congress enacted the citizen suit provision for the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" in text), 42 U.S.C. § 9659 (October 17, 1986), as the same Public Law as EPCRA, Pub. L. 99-499.

Inc., 484 U.S. 49 (1987) (interpreting the Clean Water Act).

In stark contrast to the citizen suit provision in the Clean Water Act and other environmental laws, EPCRA's citizen suit provision, 42 U.S.C. § 11046, does not contain the present tense "to be in violation" language. Instead, EPCRA's citizen suit provision authorizes citizens to file suit against persons "for failure" to submit information "under" various sections of EPCRA, including those sections requiring filing by dates certain.

Section 326 of EPCRA, 42 U.S.C. § 11046, states that, sixty days after notifying, among others, the violator, "any person may commence a civil action . . . against . . . [a]n owner or operator of a facility for failure to . . .

> (iii) [c]omplete and submit an inventory form under section 11022(a) . . .
>
> (iv) [c]omplete and submit a toxic chemical release form under section 11023(a) . . ."

Sections 11022(a) and 11023(a) require filing by dates certain. An owner or operator who has not met the statutory filing deadlines has failed to complete and submit the forms *under* §§ 11022(a) and 11023(a). In section 325(c) of EPCRA, 42 U.S.C. § 11045(c), Congress provides penalties payable to the United States of as much as $25,000 per day against a person who violates EPCRA.

B. Factual Background

For eight years, by its own admission, The Steel Company violated EPCRA. The Steel Company is not an insignificant polluter or EPCRA violator. It released *tons* of extremely hazardous chemicals into Chicago's air, and

stored other hazardous chemicals at its Chicago facility for *eight years*, without submitting *any* § 312 or 313 reports informing citizens and the government as required by EPCRA.

As a result of The Steel Company's failure to file reports for eight years, the Chicago fire department, the Illinois Emergency Planning Commission, the United States Environmental Protection Agency, the citizens of Chicago and members of CBE have suffered and continue to suffer. For eight years, any citizen seeking to inspect The Steel Company's §§ 312 and 313 EPCRA reports would have been told, "there are none." That citizen would have assumed (wrongly) that The Steel Company was *not* using threshold quantities of toxic chemicals at its facility. The citizen would (falsely) have been led to believe that The Steel Company was *not* releasing tons of hydrochloric acid—an "extremely hazardous substance" as defined by EPA—into Chicago's air. Additionally, The Steel Company's failure to file its reports skewed Chicago's emergency response plan, which is based in part on § 312 reports. The company's violations render inaccurate the national toxic chemical release inventory, which is based on timely § 313 reports.

Only *after* CBE notified The Steel Company of its intent to file this lawsuit, did The Steel Company file its reports, as many as eight years after the statutory filing deadline. During its eight year period of non-compliance, The Steel Company's releases into Chicago's air of hydrochloric acid *increased* almost every year. By contrast, those companies who complied with EPCRA during this same time frame *decreased* their toxic releases by an average of 43 percent. A2.

C. Decision Below

The Seventh Circuit applied this Court's "interpretive methodology" to determine the statute's scope. It read EPCRA's citizen suit provision according to its "most plain and natural meaning," relying on " 'the language of the statute itself.' " *Citizens for a Better Environment v. The Steel Co.*, 90 F.3d 1237 (7th Cir. 1996) (A10), citing *Gwaltney*, 484 U.S. at 56 (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The Seventh Circuit focused on the contrast in the language between the Clean Water Act's citizen suit provision (interpreted in *Gwaltney*) and EPCRA's citizen suit provision. In *Gwaltney*, the Court focused on "the undeviating use of the present tense" in the Clean Water Act. *Id.* at 59. By contrast, the Seventh Circuit found that "the language of EPCRA contains no temporal limitation."

> The plain language of the EPCRA citizen suit provision does not clearly point to the present tense as its counterpart does in the Clean Water Act. In fact, it does just the opposite. The language of EPCRA contains no temporal limitation; "failure to do" something can indicate a failure past or present. A11.

The Seventh Circuit noted that EPCRA authorizes citizens to sue " 'for failure to complete and submit' forms *'under'* Sections 312 and 313." (emphasis added). If an owner or operator has failed to meet the statutory deadlines required under EPCRA, it has failed to submit the forms *under* EPCRA and a citizen action lies:

> Congress must be assumed to have included the words "under" Sections 312 and 313 for a reason. The most natural reading of "under" a section is "in accordance with the requirements of" that section. . . We read the provision as authorizing citizen suits not only for failure to complete and submit forms, but for failure to complete and submit forms in accordance with the requirements set forth in the referenced sections. One of these requirements is the statutory mandate that forms filed under Section 312 "shall be" submitted annually by March 1. Section 313 forms "shall be" submitted by July 1 of each year. These are not guidelines or suggestions; they are essential elements of the provisions citizens have authority to enforce. Any other interpretations "would render gratuitous the compliance dates for initial submissions which Congress placed in EPCRA's reporting provisions." *Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Mfg. Co.*, 772 F. Supp. 745, 750 (W.D.N.Y. 1991). A11-A12.

While the Court in *Gwaltney* concluded that the Clean Water Act employed an "undeviating use of the present tense," the Seventh Circuit found that "the enforcement provisions of EPCRA are not likewise cast in the present tense." Instead, EPCRA's citizen suit provision refers to past violations:

> The absence of language limiting citizen suits to ongoing violations, and Congress' choice of language specifically referring to past violations, are strong indicators that a cause of action exists under EPCRA for violations that are not ongoing at the time a citizen suit is filed. A13.

The Seventh Circuit added that every court that looked at the citizen suit provisions prior to *Atlantic States Legal Foundation, Inc. v. United Musical Instruments*, 61 F.3d 473 (6th Cir. 1995) held that citizens are authorized to sue for failure to file reports within the statutory deadlines. *See also* "Subsequent District Court Decisions," section of this opposition, *infra*.

The Seventh Circuit addressed the Court's dicta in *Gwaltney* regarding the notice provision. In his 1987 *Gwaltney* opinion, Justice Marshall theorized that Congress would not have (1) required citizens to wait 60 days to file suit after giving notice to the violator, if (2) on the other hand Congress had intended to allow citizens to file suit for "wholly past" violations. The Seventh Circuit noted that "[t]his line of reasoning is no longer as compelling as it was when *Gwaltney* was decided [in 1987]. Since then, Congress has expressly intended that result." A13. In 1990, Congress enacted the Clean Air Act Amendments, which indeed (1) require a 60 day notice period, but (2) at the same time allow a citizen suit for past violations. *Id.*, citing The Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*[4] Since the 1987 *Gwaltney* decision, Congress has spoken: a notice period is consistent with a suit for past violations. The Seventh Circuit held that EPCRA's notice period does not preclude a suit for late filing.

The Seventh Circuit pointed out that "Congress placed great importance on the timing element of the reporting requirements." A12, n.2. It added that due to the rather minimal effort required to comply with EPCRA, virtually all companies who receive notices then file late reports before the notice period expires. To prevent citizen suits for late-filed reports, in effect, would eviscerate EPCRA's citizen suit provision, "shift[ing] the cost of EPCRA compliance from regulated industrial users to private citizens. . . This scenario is impossible to reconcile with the

[4] The Clean Air Act citizen suit provision is codified at 42 U.S.C. § 7604.

clearly expressed intent of Congress, or with the very existence of the citizen enforcement provision." A15.

D. The Position of the United States

The United States filed an *amicus* brief and presented oral argument before the Seventh Circuit in support of CBE's right to proceed. The United States reviewed the language of EPCRA's citizen suit provision and §§ 312 and 313 of EPCRA and concluded that these sections "authorize a citizen suit whenever an owner or operator has failed to complete and submit the required forms by the statutory deadlines." Br. at 6. The United States reviewed the Clean Water Act's ("CWA") citizen suit provision interpreted in *Gwaltney* and contrasted it with EPCRA's citizen suit provision:

> EPCRA's citizen suit provision is fundamentally different—in text, history, and purpose—from that of the CWA and several environmental statutes. Thus, despite the district court's reliance, *Gwaltney* is inapposite.

Br. at 10. The United States emphasized that citizen suits increase EPCRA compliance and aid EPA enforcement:

> [T]he district court's holding eviscerates the deterrent effect of citizen enforcement. Unless reversed, this holding will undermine EPCRA compliance, place additional burdens on EPA's enforcement resources, and diminish the reliability of critical information generated by the statutory reporting requirements.

Br. at 3. The United States "urge[d] the Court to reverse," which it did, holding that citizens may sue for failure to file timely reports. *Id.* at 20.

E. Subsequent District Court Decisions

Since the Seventh Circuit's ruling and the filing of the Petition, two additional district courts have agreed with the Seventh Circuit and specifically rejected the Sixth Circuit's *United Musical Instruments* decision. *Don't Waste Arizona, Inc. v. McLane Foods, Inc.*, Civ-95-1808-PHX-ROS (D. Az. December 17, 1996) 1996 U.S. Dist. LEXIS 19068, *13 ("Analysis of the plain language of the statute and the policies driving the enactment of the EPCRA compels the conclusion that the *Citizens* [Seventh Circuit] court has embraced the better reasoned approach to statutory construction."); *Idaho Sporting Congress v. Computrol, Inc.*, No. 96-0027-S-BLW (D. Id. December 17, 1996), 1996 U.S. Dist. LEXIS 19642, *8 ("The Court therefore chooses to follow *Steel Co.*, not *UMI*, in holding that EPCRA does permit citizen suits alleging only historical violations of the statute."). There are now nine decisions agreeing with the Seventh Circuit and one decision—*United Musical Instruments (UMI)*—going the other way.

ARGUMENT

A. The Seventh Circuit's Ruling is Correct

The Seventh Circuit's decision is correct. Petitioner and the *amicus* parties ignore the controlling language in EPCRA's citizen suit provision. They focus on subsidiary issues, none of which are relevant in view of the unambiguous language of the statute. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 847, 842-43 (1984); *Caminetti v. United States*, 242 U.S. 470, 485 (1916) (Where the language of a statute is plain and

unambiguous on its face, "the sole function of the courts is to enforce it according to its terms."). There is no reason for the Court to consider a well-reasoned decision by the Seventh Circuit.

B. There Are No Conflicts With This Court

The Seventh Circuit applied the very methodology used to interpret statutes by the Court in *Gwaltney* and numerous other cases—it focused on "the language of the statute itself." *Gwaltney* at 56. The Seventh Circuit pointed out how EPCRA's citizen suit provision language differs from the language of the Clean Water Act interpreted in *Gwaltney*. The mere fact that EPCRA, interpreted by the Seventh Circuit, affords citizens different rights than the Clean Water Act, interpreted by the Court, does not present any conflicts.

Nor are there any Constitutional issues before the Court, let alone any conflicts with the Court's interpretation of the Constitution. This case presents an issue of statutory interpretation and no more. The Steel Company's reference to "standing" is an undeveloped afterthought with no basis. Not only did The Steel Company fail to argue standing at the trial court level, but its petition fails to explain why CBE has no standing. Its argument appears to be a facial challenge to the language of EPCRA's citizen suit provision with no indication how the statute's language conflicts with any opinion of the Court. In any event, courts are clear that persons experiencing a loss of information under EPCRA and who seek penalties for late-filing have suffered an injury conferring standing. *Atlantic States Legal Foundation, Inc. v. Buffalo Envelope Co.*, 823 F. Supp. 1065,

1071 (W.D.N.Y. 1993); *Don't Waste Arizona, Inc. v. McLane Foods, Inc.*, Civ-95-1808-PHX-ROS (D. Az. December 17, 1996) 1996 U.S. Dist. LEXIS 19068; *Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132, 1138-42 (E.D. Pa. 1993).

C. The Issue Should Percolate Among the Lower Courts

The issue before the Court is not one in which lower courts are hopelessly divided. Of the *ten* decisions that have addressed citizen's authority to file suit for failure to meet the statutory deadlines, only *one* court has denied citizens that right—the Sixth Circuit in *Atlantic States Legal Foundation, Inc. v. United Musical Instruments*, 61 F.3d 473 (6th Cir. 1995). *United Musical Instruments* stands alone. It was incorrectly decided. The Sixth Circuit dismisses the controlling language of EPCRA's citizen suit provision and its variation from other environmental statutes as "hypertechnical parsing of the language". *Id.* at 477. The Sixth Circuit's analysis ignores this Court's mandate in *Gwaltney* and other cases "to read a statute according to its most plain and natural meaning." A10. The mere fact that the Sixth Circuit issued an incorrect decision does not mean that the Court should review a separate case that arrived at the correct decision.

Moreover, the Court should allow other courts to express their views to determine if a significant conflict between circuits exists. As only two circuits and six district courts (eight district court decisions) have interpreted EPCRA's citizen suit provision, denial of the petition will allow additional lower courts to consider the

issue. If the Sixth Circuit recognizes that its decision continues to stand alone, it can reexamine its ruling. *Amicus* Pacific Legal Foundation's claim (at 6) that it is unfair to allow EPCRA citizen suits in one jurisdiction and not another is no reason to grant the petition. *Amicus* can avoid "disparate treatment" by complying with the law.

D. Petitioner Misconstrues the Seventh Circuit's Holding and Its Implications

The Seventh Circuit explained that to eliminate suits for late-filing "is impossible to reconcile with the clearly expressed intent of Congress, or with the very existence of the citizen enforcement provision." A8. Congress made it clear that timely EPCRA filing is of the essence. The Sixth Circuit's decision would, in effect, eviscerate EPCRA's citizen suit provision. Rather than addressing the implications of the Sixth Circuit's decision, Petitioner and *amicus* misconstrue the impact of the Seventh Circuit's decision.

Petitioner overstates the Seventh Circuit's holding in asserting that citizens will now "exhume" violations when parties have filed forms late *without* the prompting of citizen action. This is not the holding of the Seventh Circuit. The issue before the Seventh Circuit was "whether citizens may seek penalties against EPCRA violators who file after the statutory deadline, *after receiving notice of intent to sue*, but before a complaint may be filed in the district court." A9. (emphasis added). If, as Petitioner claims, a citizen discovers late-filed reports two years after they were submitted, the reports would have been filed *before*, not "after receiving notice of

intent to sue." *Id.* Here, by contrast, when The Steel Company received CBE's notice of intent to sue, for eight years it had failed to file any reports required by §§ 312 and 313 of EPCRA.

Petitioner and *amicus* refer to the burdens and penalties imposed by EPCRA.[5] This is a matter to address with Congress.[6] In any event, the penalties are not "potentially ruinous." The Seventh Circuit made it clear that ability to pay is always a factor in assessing the penalty. A7. Petitioner and *amicus* Mid-America Legal Foundation criticize citizens who identify their EPCRA violations. EPCRA does not unduly reward citizens. It does authorize courts to award citizens their costs incurred as the prevailing party. If companies want to avoid these costs, they, rather than citizens, can monitor their own chemical use and comply with EPCRA. Compa-

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[5] Petitioner has no basis for its claim (at 12-13) that "EPCRA's effect on the environment is far less direct than [other statutes]." As the Seventh Circuit points out, those companies (unlike Petitioner) who have complied with EPCRA, have reduced their releases of toxic chemicals into the environment by an average of 43 percent since 1988.

[6] Petitioner and *amicus* Mid-America Legal Foundation cite a 1994 Illinois statute that allows companies to avoid Illinois EPA prosecution in state court if the companies file reports within a 30 day "grace period" after Illinois EPA notifies them of their failure to file. This is irrelevant as it relates to a state law, not EPCRA. In a serious omission, Petitioner and *amicus* have failed to inform the Court that the Illinois legislature has enacted a *citizen* suit provision that parallels EPCRA's citizen suit provision. After giving 60 days notice, the citizen suit provision authorizes citizens to file suit under the Illinois EPCRA. The Illinois EPCRA citizen suit statute does not include any "grace period" whatsoever. 430 Illinois Compiled Statutes 100/17.

nies who are caught violating EPCRA by citizens have no equitable argument that they are entitled to avoid penalties.

Petitioner is incorrect in asserting (at 26) that the decision "flings open the doors of federal courthouses to those actions." Since the first decision addressing the issue in 1991, every court other than the Sixth Circuit's 1995 *United Musical Instruments* ruling has authorized suits for failure to meet the statutory deadlines. The majority (and until 1995, unanimous) view has authorized EPCRA citizen suits for past violations. Yet there are very few cases in which courts have issued an opinion relating to EPCRA citizen suits. If a decision authorizing suits for failure to meet statutory deadlines would fling open the doors of courthouses, this would have already happened. It has not.

The parties supporting review are also incorrect in asserting that citizen suits for late-filing interfere with government enforcement discretion. The Seventh Circuit decision does not give citizens the same enforcement authority as the United States. Among other things, the United States can always preempt a citizen lawsuit by diligently pursuing an administrative or judicial action, 42 U.S.C. § 11046(e), and unlike citizens can pursue an administrative action. 42 U.S.C. § 11045. Under the ruling of the Seventh Circuit, citizens still supplement, rather than supplant, government enforcement. Finally, the United States—the most qualified party to speak about any interference with its own enforcement discretion—strongly encourages citizen suits under EPCRA for failure to file reports in a timely manner. If the United States felt any threat that citizens were, or might in the

future, interfere with its enforcement discretion, it would not support CBE's position.[7]

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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[7] To the extent that it was ever a concern, Congress rejected the notion that citizen suits for historical violations would undermine the enforcement discretion of the United States in 1990 when it amended the Clean Air Act and gave citizens the right to sue for past violations.